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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

vs.

W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF APPELLEES S. H. KRESS AND COMPANY OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

DWIGHT, STANLEY AND WHITEHEAD,
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Counsel for Appellees S. H. Kress and Company.

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IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 73,296

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-297

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-298

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK, *Defendants*.

(Filed Nov. 12, 1952, 3:45 P.M., U. S. District Court, S. D. of N. Y.)

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Pursuant to Rules 7 and 12 of the rules of the Supreme Court, the appellee, S. H. Kress and Company, submits herein its statement showing grounds making against the jurisdiction of this

Court asserted by appellant herein and in support of its motion to dismiss or affirm.

The complaint herein alleges that John M. Hancock (hereinafter referred to as Hancock), is simultaneously a director of S. H. Kress and Company and W. T. Grant Company (hereinafter referred to as Kress and Grant, respectively) and that these two companies are competing in such a manner that Hancock's simultaneous directorships constitute a violation of Section 8 of the Clayton Act. (15 U.S.C.A. Section 19).

There is admittedly no existing violation of Section 8. Within two weeks after the service of the complaint herein, Hancock resigned from the Board of Directors of Kress and stated his intention not to ever go back on the board. Shortly thereafter at a meeting of the Board of Directors of Kress the number of places on that Board was reduced from eight to seven and at the next shareholders' meeting a new Board of Directors was elected on which Hancock was not included. The relief sought below was an injunction to restrain and prevent a violation of Section 8. An injunction is not a means of punishment for past acts but relates only to the future. (*Standard Oil Co.* v. *United States*, 283 U. S. 163, 181-182). The question of whether Hancock has violated Section 8 has thus become moot and this Court should not entertain this appeal unless there is a danger of a revival of the acts complained of. (*United States*

v. *American-Asiatic Steamship Company et al.*, 242 U. S. 537; *Hargis* v. *Bradford*, 283 U. S. 781; *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Brownlow* v. *Schwartz*, 261 U. S. 216; *United States* v. *Hamburg-American Company*, 239 U. S. 466).

Quite obviously, plaintiff would have no cause of action against Kress, had Hancock never been on Kress's Board of Directors. The mere fact that at some previous time Hancock was on both Kress's and Grant's Board does not serve as a basis for this appeal. (*Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, note #3 on page 373; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360.)

There is nothing in the fact that Hancock has been on Kress's Board and has resigned that makes his election to the Board in the future any more likely than if he had never been on the Board at all. There is a considerable question as to whether or not Hancock was violating Section 8 when he was on the Board of both Kress and Grant. Section 8 has been on the Statute books since 1914 and there are no reported cases construing the Statute. Hancock had been on Kress's Board since 1940. Prior to the commencement of this suit the Government never notified Kress that it considered Hancock's membership on its Board of Directors a violation of Section 8. In view of the Government's failure to enforce Section 8 apparent from the lack of any reported cases con-

struing or enforcing Section 8, and its failure to request Kress to comply with the Statute for the twelve years that Hancock was on the Kress Board, it is manifest that Hancock's membership on Kress's Board of Directors, if in violation of Section 8, was in unwitting violation on Kress's part.

The fact that two weeks after this suit was brought Hancock had resigned, with assurances that he had no intention of ever going back on Kress's Board and the fact that Kress thereafter showed its good faith by not reelecting him to its Board all indicate that both Hancock and Kress have made every bona fide effort to see that Section 8 as construed by the Government is complied with. This does not show any likelihood of a renewal of the interlocking directorship that the Government complains of. In fact it shows that such a renewal is considerably less likely than if the interlocking directorship had never existed in the first place. The court below considered all of these facts and was satisfied that there was no likelihood of a renewal of the interlocking directorship complained of.

The question of Kress's and Hancock's alleged violation of Section 8 is not an existing controversy. It may be that the Government has vague fears or unfounded suspicion that Hancock will again go on Kress's Board but such fears and suspicions do not create a justiciable controversy.

Commercial Cable Company v. *Burleson*, 250 U. S. 360; *United States* v. *Hamburg-American Company*, 239 U. S. 466, 475; *Walling* v. *T. Buettner & Co.*, 133 F. (2d) 306, cert. den. 319 U. S. 771.

The Government's statement in support of jurisdiction indicates that it is not satisfied with ending the alleged violation of Section 8. It indicates, without showing why, that its attempts to enforce the statute are defeated by Hancock's removal from the Board of Directors of Kress. On the face of it, this statement is without foundation. The Government has succeeded in ending what it contends to be a violation of Section 8 without having to go to the expense and trouble of a court trial to determine whether Section 8 was actually violated. How more effectively can they enforce the section? Laws are most effectively enforced by voluntary compliance.

The Government also points out that they have requested considerably broader relief than the mere cessation of the interlocking directorship and cite *U. S.* v. *U. S. Gypsum Co.*, 340 U. S. 76, and *International Salt Co.* v. *U. S.*, 332 U. S. 392, for the proposition that the courts will enjoin more than the specific illegal practices. Those cases involved complicated anti-trust actions and presented a situation where the statute involved could be violated by many devious and subtle means and where the mere business relations of the parties could violate the Statute. Obviously, such cases

are inapplicable to a situation such as that in the case at bar. It is nowhere alleged that Hancock was related to Kress in any manner other than as a director. The affidavit of Orwill V.W. Hawkins in support of Kress's motion shows that Hancock has completely disassociated himself from Kress. The act constituting the alleged violation of Section 8 was simply membership on a Board of Directors, which membership was a matter of public record. No other relation between Kress and Hancock would constitute a violation of Section 8. Therefore, when the specific act complained of, namely, the interlocking directorship, ceased with assurances that it would not be renewed, there was no other way in which the Statute could be violated. Furthermore, those cases involved defendants who had refused to cease the activities complained of until forced to by court order. In contrast we have here defendants voluntarily complying with the Government's wishes, not adamant defendants being coerced into compliance. Since those cases are inapplicable to the present case, the Government cannot lend substance to its appeal by citing the principles decided therein.

The broader relief that the Government seeks is an injunction against Kress, enjoining it from allowing any person to serve on its Board of Directors who is also serving on the Board of a competing company. Neither the complaint nor the moving papers allege or purport to suggest that

Kress has any directors on its Board who are there in violation of Section 8. Boiled down to its simplest terms, this request for relief by the Government is nothing more than the posing of a hypothetical question. The question simply is: "If Kress should have on its Board of Directors any person who is also a director of any corporation competing with Kress, would that constitute a violation of Section 8?" The Government, of course, wants an affirmative answer to this question. The question is obviously moot since Hancock's directorship on Kress's Board has terminated and it is not asserted or alleged that there is any person now on the Board of Kress who is also on the Board of a competing corporation. An interlocking directorship in Kress and a competing company violates Section 8 only if Kress and the other company compete in the manner specified in Section 8. The determination of this question will require this court to interpret *in vacuo* the phrase in Section 8:

> " . . ., if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (15 U.S.C.R. Sec. 19)

to determine under what circumstances one corporation must be competing with another so that an interlocking directorship between these two corporations would violate Section 8. There is no authority on this question and the Government quite understandably would like to have a Court ruling for its guidance. However, this Court has repeatedly said that it will not give such advisory opinions for the guidance of the Government or for any other parties: (*Bus Employees* v. *Wisconsin Board*, 340 U. S. 416; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *California* v. *San Pablo and Tulare Railroad*, 149 U. S. 308, 314.)

It is therefore submitted that there is no present violation of Section 8 and that a determination of this case would involve only the answering of moot questions.

WHEREFORE, Appellee, S. H. Kress and Company, respectfully moves that the appeal herein be dismissed or in the alternative that the judgment of the District Court be affirmed.

Respectfully submitted,

DUER, STRONG & WHITEHEAD,
By: HARRY H. WIGGINS,
Attorneys for Defendant,
S. H. Kress and Company.

Dated: November 12, 1952.

U.S. GOVERNMENT PRINTING OFFICE 1953—237342/P O 962